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Nos. 07-1090 and 08-589

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IN THE

Supreme Court of the United States

REPUBLIC OF IRAQ,

Petitioner,

v.

JORDAN BEATY, ET AL.,

Respondents.

REPUBLIC OF IRAQ, ET AL.,

Petitioners,

v.

ROBERT SIMON, ET AL.,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

SUPPLEMENTAL BRIEF OF RESPONDENTS

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SUPPLEMENTAL BRIEF OF RESPONDENTS

Respondents submit this supplemental brief regarding the temporal scope of Section 1503 of the Emergency Wartime Supplemental Appropriations Act, Pub. L. No. 108-11, 117 Stat. 559, 579 (2003) (Section 1503). Although the D.C. Circuit previously made clear that the President's authority under Section 1503 sunset with the statute (*see Acree v. Republic of Iraq*, 370 F.3d 41, 57 (D.C. Cir. 2004); *id.* at 62 (Roberts, J., concurring in part and dissenting in part)), and respondents vigorously contested Iraq's expansive reading of Section 1503's temporal scope at the certiorari stage (Simon Br. in Opp. 16-22; Simon Supp. Cert. Br. in Response to Br. of U.S. 7-8), Iraq's opening brief addressed that issue in only three passing paragraphs (Iraq Open. Br. 32, 33-34). Iraq's reply brief now devotes nine pages to the issue (at 6-11, 13-15), necessitating a very short supplemental response to the new arguments and authorities it raises. *See* S. Ct. R. 25.5.

Contrary to Iraq's contention that Congress enacted Section 1503 to authorize the President to make "Section 1605(a)(7) inapplicable to Iraq and thus restor[e] Iraq's sovereign immunity to the status enjoyed by other U.S. allies" (Reply Br. 1), the relevant authority was a much more modest "proviso" to an "[e]mergency" wartime "[a]ppropriations" measure that was set to "expire" a mere seventeen months later. Congress did not in this fashion, for the first time ever, authorize the President to permanently withdraw Article III jurisdiction over pending lawsuits. Given that Baghdad had fallen only four days earlier and the Hussein regime had not surrendered, Iraq was not at that time remotely

on equal footing with "other U.S. allies." *Contra* Reply Br. 1. The statute's obvious purpose was instead simply to permit the President immediately and on an interim basis to lift certain sanctions that endangered Iraq's economic functioning. Iraq's assertion that Congress intended that Iraq – unlike any other nation, including our closest allies – would be *permanently* insulated from sanctions for terrorism is implausible.

Contrary to Iraq's contention that Section 1503 operates retroactively because the phrase "make inapplicable" is "unqualified" (Reply Br. 6), "make" is actually a prospective term that means "to cause (something) to exist" (Black's Law Dictionary 975 (8th ed. 2004)). Even Iraq admits that Congress intended Section 1503 to operate prospectively: Iraq explains that "past violators" of sanctions would still be "penalized" (Reply Br. 7) – *i.e.*, that Congress did not intend to permit the President to retroactively lift the sanctions and immunize previous violations. Iraq cannot explain how the same statutory language has retroactive effect when applied to claims under FSIA Section 1605(a)(7). When the United States removes a nation's designation as a terrorist state, it remains liable under the FSIA for its prior acts of torture; the same result obtains here. 28 U.S.C. § 1605(a)(7)(A) (repealed 2008); 2008 NDAA 28 U.S.C. § 1605A(a)(2)(A)(i)(I) (similar). By contrast, when Congress intends to eliminate the federal courts'

jurisdiction over previously filed claims for torture by terrorist states, it says so expressly.[1]

Contrary to Iraq's reliance on this Court's construction of the FSIA in *Republic of Austria* v. *Altmann*, 541 U.S. 677 (2004) (Reply Br. 6-8), the "make inapplicable" language of Section 1503 is not a provision of the FSIA but instead is a general statute subject to the ordinary presumption against retroactivity. Because Iraq seeks the dismissal of respondents' pending claims with prejudice (*contra* Reply Br. 11), the presumption is that Section 1503 operates only prospectively. *Hamdan v. Rumsfeld*, 548 U.S. 557, 576-77 (2006). In any event, sovereign immunity (which is an immunity from suit) is determined at the time of the claim is filed, not later (*Dole Food Co. v. Patrickson*, 538 U.S. 468, 478 (2003); *Smith v. Sperling*, 354 U.S. 91, 93 n.1 (1957)); and changes in a nation's status as terrorist state in particular have only prospective effect (*see supra*).

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[1] Libyan Claims Resolution Act, Pub. L. No. 110-301, § 5(b), 122 Stat. 2999, 3000-01 (2008) ("temporal scope" of restoration of Libya's immunity from claims under FSIA Section 1605(a)(7) upon Secretary of State's certification applies "regardless of whether, or the extent to which, application of that subsection affects any action filed before, on, or after that date"); National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083(d)(2)(c), 122 Stat. 338, 344 (2008) ("temporal scope" of the President's power to "waive" application of the cause of action under FSIA Section 1605A to Iraq applies "regardless" of whether it would affect "any action filed before, on, or after the date of the exercise of that authority").

Finally, contrary to Iraq's assertion that the "*actions*" the President took under Section 1503 remain effective (Reply Br. 13 (emphasis in original)), on the date that the statutory "authorit[y]" for those actions "expire[d]" (117 Stat. 579 (eighth proviso)), the President's power to execute faithfully that law sunset as well (U.S. Const. art. II, § 3), and Section 1605(a)(7) became once again "[]applicable with respect to Iraq" (117 Stat. 579 (second proviso)). If the President's actions were actually permanent, there would have been no need, *after* the President exercised his authority, for (a) Congress to extend Section 1503's expiration date (*see* Pub. L. No. 108-106, § 2204(2), 117 Stat. 1209, 1230 (2003)), or (b) the Secretary of State to remove Iraq's designation as a terrorist state (*see* 69 Fed. Reg. 61,702 (2004)).

Iraq's examples of instances in which Congress "provided a limited period for the exercise of statutory waivers" that survived the authorizing statute's sunset (Reply Br. 14) are inapposite because each involves an act by the President (for example, granting citizenship) that confers a benefit or status that exists until affirmatively withdrawn. Other statutory authorizations to the President that are more analogous to Section 1503, because they regulate ongoing activity, sunset with their enacting statute.[2]

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[2] *See, e.g.*, 19 U.S.C. § 2466b (President's authority to grant preferential trade treatment for certain products originating in eligible sub-Saharan African countries); 42 U.S.C. § 1973b(a)(8) (Attorney General's authority to designate states as subject to preclearance requirements

For the foregoing reasons, as well as those set forth in respondents' opening briefs, the judgments should be affirmed.

Respectfully submitted,

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under Voting Rights Act); Pub. L. No. 108-136, § 1306, 117 Stat. 1392, 1661 (2003) (President's authority to waive limitations on funding for chemical weapons destruction facility in Russia); Pub. L. No. 110-417, § 219(c), 122 Stat. 4356, 4390 (2008) (Secretary of Defense's authority to provide funds for defense laboratories for research and development of technologies for military missions).